

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP92-CR

Cir. Ct. No. 2012CF216

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRADLEY T. RICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: MICHAEL MORAN, Judge. *Affirmed.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Bradley Rick appeals a judgment of conviction for operating with a prohibited alcohol concentration, fourth offense, and the denial of a postconviction motion seeking a new trial. We affirm.

BACKGROUND

¶2 Wausau Police Department officer Jacob Albee testified at the preliminary hearing in this case that, while he was parked at an entrance to Marathon Park in Wausau in the early morning hours of March 24, 2012, he heard an engine revving as if a vehicle was accelerating. Albee testified he observed a vehicle driving up Tenth Avenue from Stewart Avenue at a high rate of speed and being pursued by a squad car, which car he later learned was operated by officer David Prokop. Albee followed up Tenth Avenue to Greenhill Drive and came upon the vehicle backed into a driveway with the other squad car's spotlight shined on it.

¶3 After the driver, later determined to be Rick, exited the vehicle, Albee made contact with him. Albee noticed a moderate odor of intoxicants, and Rick seemed somewhat unsteady on his feet. Rick stated he had one drink at a local pub. Rick then failed field sobriety tests and was asked to submit to a preliminary breath test. Rick was provided three opportunities to perform, but each time he "gave short bursts of air which the preliminary breath test will not accept." Rick was then arrested and transported to the hospital for a blood test. Rick's blood-alcohol level tested .149g/100ml.

¶4 An Information alleged felony operating a motor vehicle while intoxicated and felony operating with a prohibited alcohol concentration, both as fourth offenses.¹ Rick filed a motion to suppress "based upon a lack of reasonable suspicion for investigative measures outside the scope of the initial detention." At

¹ Rick was also charged with operating a motor vehicle while his license was revoked.

the October 30, 2012 hearing on the motion, Rick's attorney stated, "The thrust of the suppression motion is they have the wrong car and the wrong man."

¶5 Passengers in Rick's vehicle that night testified at the suppression hearing that Tenth Avenue does not go through to Greenhill Drive, and that there was no possible way for an officer to go up Tenth Avenue directly to Greenhill Drive. The passengers also testified that Rick was operating the vehicle when they left the pub, and when they arrived at the residence on Greenhill Drive, Rick backed the vehicle into the driveway. Within a few minutes "two cop cars pulled up."

¶6 Albee testified at the suppression hearing, again stating that he heard an engine revving and observed a vehicle that he associated with that sound traveling on what he believed to be Tenth Avenue. Albee also observed the other squad car "accelerating rapidly, going northbound on South Tenth Ave. in the same direction as the other vehicle." Albee tried to catch up to the other squad car in front of him as they turned onto Greenhill Drive. When Albee arrived in the area of Greenhill Drive, he observed Officer Prokop's squad with a spotlight shined on Rick's vehicle, "and I could hear him say something about the person's speed to the defendant, who was exiting the vehicle." Albee testified that, after his initial observation of the vehicle speeding, it took him less than two minutes to arrive in the area where Prokop was parked.

¶7 Prokop also testified at the suppression hearing. He stated that a vehicle caught his attention at 2:35 a.m. making a left-hand turn onto Tenth Avenue and rapidly accelerating up the hill. Prokop testified he "accelerated to try to catch the vehicle." Prokop observed the vehicle turn onto Greenhill Drive. He testified: "I lost sight of it briefly as I was trying to catch up to it, and after I made

my right-hand turn onto Greenhill, I come up a small rise, and I saw the vehicle backing into—the same vehicle that I observed backing into a driveway.”

¶8 Prokop testified he lost sight of the vehicle for “not more than ten seconds.” He estimated the entire pursuit from Tenth Avenue took less than a minute. Prokop testified that, upon arriving at the driveway, he had a conversation with the person in the driver’s seat regarding “how fast he thought he was going up 10th Avenue.”

¶9 At the conclusion of Prokop’s cross-examination, the circuit court noted an issue as to whether Tenth Avenue and Greenhill Drive intersect. During redirect examination, and after consulting a map, Prokop corrected his testimony²:

Q: I guess based on the additional inquiry of the judge, is there any change in your original—

A: It would have been the street that is between—what I thought was 10th Avenue is actually—I believe it’s 12th Avenue.

....

A: Yes. It would have been South 12th Avenue.

....

Q: So you don’t believe you were ever traveling on 10th Avenue?

A: I don’t believe so. Not looking at the map, no.

² Rick’s initial brief in this appeal failed to acknowledge that, during the October 2012 suppression hearing, Prokop specifically corrected his understanding of whether it was Tenth versus Twelfth Avenue on which he traveled while following Rick’s vehicle.

¶10 Prokop testified that his mistake in naming the avenue did not change the fact he followed Rick from Stewart Avenue north on a numbered avenue that connected with Greenhill Drive.

Q: So are you confident that you observed—the only course of travel that you observed was traveling north on a particular street until that intersected with Greenhill Drive?

A: Correct.

Q: There were no other turns along the way?

A: There was not that I had made.

Q: But the vehicle that you observed pull into the driveway on Greenhill Drive was the same vehicle that you observed turn from Stewart Avenue and travel north on what you believe was 12th Avenue?

A: Yes.

¶11 At the conclusion of the hearing, the circuit court requested written arguments, and it subsequently denied the suppression motion in an oral decision.³ After a jury trial on November 12, 2013, Rick was found guilty of operating while intoxicated and operating with a prohibited alcohol concentration, and the circuit court entered judgment on the latter, based on Rick's preference. Rick filed a postconviction motion seeking a new trial. The circuit court denied the motion, and Rick now appeals.

³ The circuit court denied Rick's suppression motion in an oral decision, but the transcript of that oral decision was not made a part of the record on appeal. We assume missing material supports the circuit court decision under attack on appeal. See *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993).

DISCUSSION

¶12 Rick advances three arguments on appeal. Each argument relates to the initial mistake of officers Albee and Prokop regarding the particular road on which they pursued Rick’s vehicle between Stewart Avenue and Greenhill Drive in Wausau. First, Rick argues the circuit court at trial “foreclose[d] trial counsel from impeaching both officers regarding their prior testimony” concerning whether they followed Rick’s vehicle on Tenth versus Twelfth Avenue. Rick specifically attacks the circuit court’s decision, in one instance, to limit the repetitive nature of his counsel’s questioning of Albee.

¶13 The record belies Rick’s claim that counsel was foreclosed from impeaching Albee and Prokop at trial. During cross-examination, counsel repeatedly challenged both officers with their previous testimony concerning their use of Tenth Avenue. Indeed, counsel arguably badgered the officers with accusations of lying regarding their inconsistent testimony. Counsel also challenged the officers’ memory and integrity, going so far as to ask the officers whether they were taking medication for memory problems.

¶14 It was clear from Albee’s trial testimony that he admitted his prior testimony and reports were incorrect concerning his traveling on Tenth Avenue. Nevertheless, after a lengthy exchange during cross-examination, counsel requested the circuit court to instruct Albee to answer “yes or no” to a question related to whether “what you wrote in your report is false?” The circuit court appropriately stated, “I think he has answered it. Move on.”

¶15 Quite simply, witnesses are not infallible, and the law does not require them to be so as to their honest recollection of events. Perceptions are sometimes faulty or memories are inaccurate. If a witness later corrects his or her

testimony, that does not necessarily equate to a lie. Here, the officers testified they recognized they must have been driving up Twelfth Avenue, not Tenth Avenue, during their pursuit of Rick's vehicle. It was for the jury to determine the credibility of their testimony in light of this mistake, as well as in contrast to other testimony, including that of Rick's passengers. *See Johnson v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). Furthermore, the circuit court did not misuse its discretion when handling Rick's counsel's request for a "yes or no" answer during Albee's cross-examination. This is especially so given the manner and length of counsel's cross-examination of both officers on the issue of the road actually traveled.

¶16 Second, Rick argues the State was bound by principles of judicial estoppel to continue contending, at trial, that the officers had been traveling on Tenth Avenue rather than Twelfth Avenue. Rick insists the State "relied upon Officer Jacob Albee's testimony at the Preliminary Hearing and the State should not be allowed to obtain a bind over and then a conviction at Trial using different facts."⁴ This argument is meritless.

¶17 As the circuit court noted at the postconviction motion hearing, the evidence established that the officers observed a vehicle almost continuously until Prokop observed the vehicle backing into the driveway on Greenhill Drive. The court stated:

[T]he reason I did the bindover, was that this vehicle was viewed from a time that the engine was heard revving. It

⁴ Rick also argues, "Once the State became aware of the 'mistake' as to the route of travel, Mr. Rick asserts that the bind over then became improper." Rick fails to provide citation to any legal authority supporting this argument, and thus we do not further address it. *See M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

went up the hill. Another officer followed it, and it was continuously within the view, except for a small portion of time, of the officers, until that vehicle was seen backing into a parking spot on Greenhill Road.

....

So what I am getting at is that the evidence at the preliminary hearing, giving all inferences to the state, that the car was observed from the time that it was heard as it went up the hill, whether on 10th or 12th Avenue, and was observed continuously until it was parked, gave this court enough of a legal reason for a bindover.

¶18 Judicial estoppel does not require parties to perpetuate mistakes in earlier testimony. *See State v. Petty*, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996). Prokop’s testimony at the suppression hearing that “[m]y streets were mixed up,” was not the answer counsel wanted, but judicial estoppel is not applied where the prior inconsistent testimony was based on witness inadvertence or mistake. *See id.*

¶19 Equally unavailing is Rick’s third argument, which is that the State failed to disclose Albee’s “exculpatory testimony” to the defense prior to trial, contrary to *Brady v. Maryland*, 373 U.S. 83 (1963).⁵ Rick asserts that only Prokop, not Albee, changed his testimony at the hearing on the motion to suppress regarding the street traveled. According to Rick, “it does not follow that Officer Albee would have the same recollection as officer Prokop.” Rick claims the State was “fully aware” that Albee also intended to change his testimony at trial, but “this information was not communicated to the defense.”

⁵ While Rick’s appellate argument characterizes the State’s failure as one of not disclosing “exculpatory” evidence, we take his argument to mean the evidence was favorable to him either because it was exculpatory or impeaching. In either or both senses, his argument fails.

¶20 Rick ignores the fact that the suppression hearing—at which Prokop plainly clarified the road on which he believed Rick’s vehicle was pursued—occurred over a year before his trial. As the trial court noted: “It was a full year almost. So you had that information for that period of time. It’s hard to make out a *Brady* violation when that evidence has been clearly on the table for a year[.]”

¶21 Indeed, the focus of the suppression hearing was on the officers’ pursuit that night. The passengers in Rick’s vehicle testified that the only avenues connected to Greenhill Drive were Eighth and Twelfth Avenues. Officer Albee testified prior to Prokop at the suppression hearing. After Prokop’s cross-examination, the circuit court judge first brought forth his concern whether Tenth Avenue and Greenhill Drive intersected. As the court correctly recognized, neither of the officers could have been following Rick’s vehicle on Tenth Avenue, since that would have been an impossibility: Tenth Avenue dead-ended without connecting to Greenhill Drive.

¶22 After consulting a map prior to his redirect examination, Prokop realized he had been driving down Twelfth Avenue, and he clarified his testimony to that effect. Moreover, Twelfth Avenue is the entrance to Marathon Park, where Albee stated he began his pursuit. Under these circumstances, trial counsel must have been aware from the date of the suppression hearing that both officers would likely testify at trial they had been driving on Twelfth Avenue rather than Tenth Avenue.

¶23 The record also confirms that Rick’s counsel had a full opportunity to cross-examine both officers at trial. Prokop testified prior to Albee at trial. Counsel was fully prepared to impeach Prokop with his prior inconsistent statements; the subsequent cross-examination of Albee constituted fifty-four pages

of trial transcript. Nothing in counsel's examination of Albee shows he was unprepared in his attempt to impeach Albee regarding his testimony of using Twelfth Avenue. In fact, when it was all said and done, Rick's counsel stated in his closing argument that he went through both officers' inconsistent statements "in great detail" and "probably ad nauseam." As the circuit court noted, "you really gave it to them on the stand."

¶24 In any event, neither the fact of which of the two roads was traveled nor Albee's corrected recollection in that regard "could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Thus, Rick did not suffer prejudice under *Brady*. The critical factor was that the officers testified to having Rick's vehicle within view for almost the entire time they were following it. As the circuit court stated:

Whether they went up 10th Avenue or 12th Avenue is not something that has changed the fact that this vehicle was within view of at least one officer, and if not two officers, for a large portion of time before it was found parked. In fact, Officer Prokop indicated that he saw the vehicle ... backing into the parking spot. That was his testimony.

¶25 Furthermore, Rick's passengers testified at trial that Rick operated the motor vehicle from the pub until he backed it into the driveway on Greenhill Drive prior to the officers' arrival. There is no dispute that Rick exited the driver's seat of the vehicle and Albee made contact with him at that time. It is also undisputed that Rick's blood-alcohol concentration exceeded the limit allowable for him by law. In short, it was not material to Rick's guilt or innocence whether the officers followed Rick on Tenth Avenue or Twelfth Avenue.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

